

WCA Rule Advisory Committee 2-28-08 Meeting

Draft No-Loss and Exemptions Sections

8420.02200600 NO-LOSS DETERMINATIONS.

~~—A landowner unsure if proposed work will result in a loss of wetland may apply to the local government unit for a determination. A landowner who does not request a determination may be subject to the enforcement provisions in part 8420.0290 and Minnesota Statutes, section 103G.2372. The local government unit must keep on file all documentation and findings of fact concerning no-loss determinations for a period of ten years.~~

~~—The landowner applying for a no-loss determination is responsible for submitting the proof necessary to show qualification for the claim, including proof of the requisite property rights to do the activity. The local government unit may evaluate evidence for a no-loss claim without making a determination.~~

~~—The local government unit decision must be made in compliance with Minnesota Statutes, section 15.99. The local government unit decision must be sent to the landowner, members of the technical evaluation panel, the watershed district or water management organization if there is one, the commissioner of natural resources, and individual members of the public who request a copy within ten working days of the decision.~~

Due to the reorganization effort, the sections above are to be reworded and relocated into other sections of the revised rule. Paragraphs 1 and 2 will be addressed in the application requirements section (0400 series) and paragraph 3 will be addressed in the noticing section (0500 series).

A local government unit may, under their own authority, require landowners to apply and submit proof necessary to show qualification for a no-loss determination. Landowners completing an activity that qualifies for a no-loss must comply with part 8420.0400, subpart 2 of the application requirements. The local government unit shall make a no-loss determination if the landowner requests and if either:

A. the work/activity will not impact a wetland;

B. the activity is limited to excavation and meets all of the following:

(1) the excavation is restricted to wetland areas that have been degraded by actions wholly unrelated to the proposed project or project sponsor, or excavation is limited to wetland areas that are predominantly exotic and/or invasive plant species;

(2) the excavated wetland will not receive additional untreated stormwater or agricultural drainage, or be physically altered solely to gain necessary storage capacity to meet other unrelated regulatory requirements;

(3) side slopes of excavated areas must be no steeper than 5:1 and maximum water depth must be less than two meters;

(4) the excavation will not result in a threat to public health, safety, and welfare; and

(5) the excavation will not drain, fill, or indirectly impact the wetland.

The change proposed to this part is intended to allow for some regulated wetland excavation activities to be done in a manner that will maintain or enhance wetland function and value without the need for a replacement plan or wildlife habitat exemption. Criterion 1 limits the eligibility to degraded wetlands where the project sponsor is not associated with the degradation. Criterion 2 eliminates the potential for excavated wetlands to receive untreated stormwater and thereby be altered in order to serve a stormwater role rather than maintain or enhance wetland function. Criterion 3 requires flat slopes for safety and a broad, more natural, transition area (another option being considered for this criteria is to simply reference replacement wetland construction standards for consistency), and criterion 4 raises the awareness of safety risks associated with excavated ponds.

BC. the excavation ~~work~~activity is limited to removal of sediment or debris such as trees, logs, stumps, beaver dams, blockage of culverts through roadways, and trash, provided the removal does not result in alteration of the original cross-section of the wetland or watercourse;

Changes to item C are proposed in order to incorporate removal of beaver dams and culvert blockage from the incidental exemption and allow these activities as a No-Loss. Dam removal and culvert blockage was felt to be better addressed as a no-loss because debris removal already exists as a no-loss category and doing either activity in a particular wetland would negate the use of any other exemption in the same wetland. This change does not reduce a landowner's ability to remove dams or culvert blockages and bring water levels to a more normal level. Other edits are proposed in order to account for work that does not directly alter a cross-section, but indirectly causes a alteration (e.g. beaver dam removal that results in erosion cutting a deeper channel).

CD. temporary or seasonal water level management activities that will not result in the conversion of a wetland to a nonwetland;

DE. the ~~activities are~~activity is in a surface impoundment created in upland for containment of waste material or water treatment;

EE. the activity is being conducted as part of an approved replacement or banking plan or is conducted or authorized by public agencies for the purpose of wetland restoration, fish and wildlife habitat restoration or improvement using guidance in part 8420.0112, item J, or repair and maintenance of earthen containment structures;

FG. the excavation activity is limited to ~~excavation and~~ removal of deposited sediment in constructed stormwater management basins or wetlands that are presently utilized as stormwater management basins, or to excavation and removal of contaminated substrate, and the excavated area is stabilized so as to prevent water quality degradation and the excavation is limited to the minimum dimensions necessary for achieving the desired purpose; or

GH. the project is an impact rectification activity listed in part 8420.0520, subpart 5-a temporary impact that is rectified by repairing, rehabilitating, or restoring the affected wetland. The local government unit may grant a no-loss determination under this subitem once in a ten-year period for a particular site within a wetland, except that repairs to the original project shall

be allowed under this no-loss determination, if the local government unit determines the request to be necessary and reasonable and the following criteria are met:

(1) the plant communities and physical characteristics of the affected wetland; including ground elevations, contours, inlet dimensions, outlet dimensions, substrate, plant communities and hydrologic regime are restored to preproject conditions sufficient to ensure that all preproject functions and values are restored;

(2) the activity is completed and the physical characteristics of the wetland are restored within six months of the start of the activity, unless an extension is granted by the local government unit after consultation with the technical evaluation panel; and

(3) the party responsible for the activity landowner provides a performance bond sufficient financial assurance, acceptable to the local government unit for an amount sufficient to cover the estimated costs to restore the wetland to preproject conditions. The local government unit shall return the performance bond financial assurance to the responsible party landowner upon a determination by the local government unit that the when conditions in this item and item B have been met by the landowner.

This part is proposed to be relocated here from the sequencing section because, as currently written in 8420.0520, it is specifically relevant to no-loss determinations, not replacement plans. Minor wording and formatting changes have been made here, but the section is mostly unchanged from 8420.0520, Subpart 5. The first paragraph is underlined as new text because it is a consolidation and reorganization from multiple sentences.

8420.01150700 SCOPE OF EXEMPTION STANDARDS.

Persons proposing to conduct an exempt activity are encouraged to contact the local government unit ~~or the local government unit's designee~~ for advice on determining whether a proposed project is eligible for an exemption and to evaluate alternatives to avoid or minimize wetland impacts. A local government unit may, under their own authority, require landowners to apply and submit proof necessary to show qualification for an exemption determination.

An ~~activity~~impact is exempt ~~from the replacement plan procedures in part 8420.0800 to 8420.0900~~ if it qualifies for any one of the exemptions ~~in part 8420.0710, even though it may be indicated as not exempt under another exemption.~~ Landowners impacting a wetland under an exemption must comply with part 8420.0400, subpart 2 of the application requirements.

The edits above are intended to clarify that exemptions are impacts that are exempted from the replacement plan requirements rather than activities exempted from regulation by WCA. Text was also added to remind landowners of possible application requirements.

~~These exemptions do not apply to calcareous fens as identified by the commissioner.~~

No exemptions apply to ~~wetlands~~impacts to:

~~A. calcareous fens as identified by the commissioner that have been previously restored or created as a result of an approved replacement plan;~~

~~B. wetlands that have been deposited in the state wetland bank;~~

~~C. wetlands that have been restored or created as part of an approved replacement plan; or~~

~~D. wetlands that were partially impacted in order to claim an exemption on the remainder, when the exemption would not have been applicable before the partial impact.~~

Impacts to any~~All~~ such wetlands are subject to replacement ~~on subsequent drainage, excavation, or filling plan procedures identified in parts 8420.0800 to 8420.0900 or other regulations as indicated in part 8420.0105.~~

The changes above mostly rearrange existing language to make the item more concise and understandable. All items previously existed in part 8420.0115 and items B and C also exist in part 8420.0530.

~~—Wetlands may not be partially drained, excavated, or filled in order to claim an exemption or no-loss determination on the remainder. Therefore, no exemptions or no-loss determinations can be applied to the remaining wetland that would not have been applicable before the impact. Exemptions may not be combined on a wetland that is impacted by a project. Wetlands impacted under an exemption in part 8420.0710 cannot be restored for replacement or bank credit within ten years of the exempt impact.~~

The deleted language was incorporated into item D of the itemized list above. The inserted language is proposed to reaffirm what is already stated in 8420.0530 and 8420.0720.

~~—A person conducting an activity in a wetland under an exemption in part 8420.0122 shall ensure that:~~

~~—(1). appropriate erosion control measures are taken to prevent sedimentation of the water;~~

~~—(2). the activity does not block fish activity in a watercourse; and~~

~~—(3). the activity is conducted in compliance with all other applicable federal, state, and local requirements, including best management practices as listed in part 8420.0112, and water resource protection requirements established under Minnesota Statutes, chapter 103H.~~

This section is proposed to be relocated to 8420.0400 and made relevant to no-loss and replacement plan projects as well as exemptions.

Present and future owners of wetlands ~~drained or filled~~impacted without replacement under an exemption for agricultural activities in part 8420.0122, subpart 2, items B and E, 8420.0710 Subpart 1 and agricultural drainage activities in part 8420.0710 subpart 2, item B, can make no use of the wetland area after it is ~~drained, excavated, or filled~~impacted, other than as agricultural land or other use as specified in 8420.0710, subpart 1, item (B), for at least ten years after the ~~draining, excavating, or filling~~impact, unless it is first replaced under the requirements of Minnesota Statutes, section 103G.222. ~~Also, for at least ten years the wetland may not be restored for replacement credit.~~ Except for land in public ownership, at the time of ~~draining, excavation, or filling~~impact, the local government unit may require the landowner to record a notice of these restrictions in the office of the county recorder for the county in which the project is located. ~~The local government unit may require recording a notice of these restrictions~~ if it determines the wetland area ~~drained~~impacted is at risk of conversion to a nonagricultural use, or other use as specified in 8420.0710, subpart 1, item (B), within ten years based on the zoning classification, proximity to a municipality or full service road, or other criteria as determined by the local government unit. In making a determination under this subpart, the local government unit must review the applicable comprehensive plan when evaluating the risk of conversion to a non-agricultural use and monitor and enforce the prohibition on using the area ~~drained, filled or excavated~~impacted for a non-agricultural purpose, or other use as specified in 8420.0710, subpart 1, item (B), for at least ten years.

At a minimum, the recorded document must contain the name or names of the landowners, a legal description of the property to which the restrictions apply, a statement of the restrictions, the date on which the restriction expires, the name of the local government which certified the exemption, if such occurred, the signatures of all owners, and an acknowledgment of ?????.

This item is proposed to be relocated here in order to keep this permanent rule consistent with every other permanent and emergency rule to date. This language was inserted in statute in 2007, relocated to the drainage exemption and, inadvertently omitted from the agricultural exemption during the emergency rule drafting. This relocation will make the permanent rule consistent with the WCA purpose, will provide for simplification and clarification by keeping the permanent rule consistent with all previous rule versions, will improve accountability of WCA and will provide tangible

results by keeping wetland losses due to agricultural activities within the intended land use.

8420.01220710 EXEMPTION STANDARDS.

Subpart 1. **Agricultural activities.** A replacement plan for wetlands is not required for:

A. ~~activities impacts to in~~ a wetland that was planted with annually seeded crops or was in a crop rotation seeding of pasture grass or legumes in six of the last ten years prior to January 1, 1991. Documentation, such as aerial photographs, ~~and~~ United States Department of Agriculture records, ~~or affidavit of landowner must be required by the local government unit to show and use may be used~~ as evidence for this exemption. ~~A sworn affidavit from current or previous landowners, or others with specific knowledge about the project, may be provided in the absence of, or as a supplement to, the above evidence.~~ ~~Land~~Wetlands eligible for this exemption must be ~~wetland types 1 and 2~~seasonally flooded basins, sedge meadow, fresh wet meadow, or wet to wet-mesic prairie;

This section is proposed to be edited to clarify that it is the responsibility of the landowner to submit the proof necessary to show qualification, not the LGU's responsibility to require the information. Edits are also proposed to accommodate the transition from Circular 39 to the wetland plant community system. No statute change should be required for these edits.

B. ~~activities impacts to in~~ a ~~type 1 wetland~~seasonally flooded basin on agricultural pasture land that remains in the same use, ~~except for bottomland hardwood type 1 wetlands, and impacts in a type 2~~sedge meadow, fresh wet meadow, wet to wet-mesic prairie, shrub carr, or alder thicket ~~or type 6 wetland~~ that is less than two acres in size and located on agricultural pasture land that remains in the same use;

Edits above only serve to accommodate the transition from Circular 39 to the wetland plant community system.

C. ~~activities in a wetland conducted as part of normal farming practices. For purposes of this clause, "normal farming practices" means farming, silvicultural, grazing, and ranching activities such as plowing, seeding, cultivating, and harvesting for the production of feed, food, and fiber products, but does not include activities that result in the draining of wetlands;~~

This exemption is proposed to be moved to Scope because the activities covered by this exemption are not regulated by WCA. Inclusion of an exemption for "normal farming practices" implies that WCA regulates the use of the bed of a wetland during dry periods for cropland. Existing statute clearly states that WCA does not regulate these activities and therefore retaining this exemption would cause a conflict with existing statute. The Scope section will be updated to incorporate some of the language in this part.

D. ~~impacts resulting from~~ soil and water conservation ~~practices, that do not permanently drain or fill a wetland,~~projects approved/certified by the soil and water conservation district, ~~after and~~ review ed by the technical evaluation panel, ~~provided the project limits the impact on the hydrologic and biologic characteristics of the wetland.~~ For purposes of this item, examples of

soil and water conservation practices includes those identified in the State Cost Share Program Manual, ~~available at the BWSR website (<http://www.bwsr.state.mn.us/cs/costsharemanual.pdf>)~~, and federally funded demonstration, research, and cost share programs and projects;

The changes above are proposed in order to make the exemption more consistent with statute and add clarification. Minimization language was included (from forestry exemption) in order to limit potential wetland loss from use of this exemption.

DE. aquaculture ~~activities~~impacts including pond excavation and construction and maintenance of associated access roads and dikes authorized under, and conducted in accordance with, a permit issued by the United States Army Corps of Engineers under section 404 of the federal Clean Water Act, United States Code, title 33, section 1344, but not including construction or expansion of buildings;

EF. wild rice production ~~activities~~impacts, including necessary diking and other ~~activities~~impacts authorized under a permit issued by the United States Army Corps of Engineers under section 404 of the federal Clean Water Act, United States Code, title 33, section 1344; or

EG. agricultural ~~activities~~impacts that are subject to federal farm program restrictions that meet minimum state standards under this chapter and Minnesota Statutes, sections 103A.202 and 103B.3355, and that have been approved by the Board of Water and Soil Resources, the commissioners of natural resources and agriculture, and the Pollution Control Agency. The approved conditions and standards shall be noticed by the board to local government units and published in the State Register. The conditions and standards shall take effect 30 days after publication and remain in effect unless superseded by subsequent statute, rule, or notice in the State Register. This exemption may be applied to agricultural land annually enrolled in the federal Farm Program as long as wetlands are not ~~drained, excavated, or filled~~impacted beyond what is:

(a) allowed under the other exemptions in this part;

(b) necessary to replace, maintain, or repair existing private drainage infrastructure with a capacity not to exceed that which was originally constructed; or

(c) replaced at a ratio of 1:1 or greater under United States Department of Agriculture provisions as supported by documentation from the United States Department of Agriculture which must be included as evidence to support this exemption.

If ~~the activity~~an impact would result in loss of eligibility, the landowner cannot qualify for the exemption.

Subp. 2. **Drainage.**

A primary objective of the following edits is to rearrange the drainage subpart into a drainage maintenance part (existing drainage) and an agricultural drainage part (new drainage).

A. **Drainage Maintenance.** For the purposes of this subpart, "public drainage system" means a drainage system as defined in Minnesota Statutes, section 103E.005, subdivision 12, and any ditch or tile lawfully connected to the drainage system.

~~B. A replacement plan is not required for draining of type 1 wetlands, or up to five acres of type 2 or type 6 wetlands, in an unincorporated area on land that has been assessed drainage benefits for a public drainage system, provided that:~~

~~— (1) during the 20-year period that ended January 1, 1992:~~

~~— (a) there was an expenditure made from the drainage system account for the public drainage system;~~

~~— (b) the public drainage system was repaired or maintained as approved by the drainage authority; or~~

~~— (c) no repair or maintenance of the public drainage system was required under Minnesota Statutes, section 103E.705, subdivision 1, as determined by the public drainage authority; and~~

~~— (2) the wetlands are not drained for conversion to:~~

~~— (a) platted lots;~~

~~— (b) planned unit, commercial, or industrial developments; or~~

~~— (c) any development with more than one residential unit per 40 acres, except for parcels subject to local zoning standards that allow family members to establish an additional residence on the same 40 acres.~~

~~— If wetlands drained under this item are converted to uses prohibited under subitem (2) during the ten-year period following drainage, the wetlands must be replaced under Minnesota Statutes, section 103G.222.~~

This provision was added in 1996 and is specific to new drainage activities for agricultural purposes. Therefore, this part is proposed to be relocated to the agricultural drainage item of this subpart.

For ~~items C and D~~ projects proposed under item A of this subpart, the landowner must provide documentation that ~~the~~ wetlands ~~which will to~~ be partially or completely ~~drained~~ impacted by ~~the drainage~~ maintenance have not existed for more than 25 years. Documentation may include, but is not limited to: aerial photographs, climatological records, soil borings, vegetative analysis, elevation surveys, ~~or drainage system maintenance records or sworn affidavits. A sworn affidavit from current or previous landowners, or others with specific knowledge about the project, may be provided in the absence of, or as a supplement to, the above evidence.~~

Spoil must be placed and stabilized in a manner that minimizes wetland impacts without jeopardizing the stability of the ditch or contributing to downstream water quality problems.

Previous permanent rule versions included language to limit sidecasting of fill to a 1-rod width and require stabilization of the spoil through re-vegetation. The above addition will

provide for minimization of wetland impacts while providing the drainage authority with the flexibility to consider ditch stability and water quality issues.

G(1). Public drainage system maintenance. A replacement plan is not required for draining, excavating, or filling of wetlands ~~except for draining types 3, 4, and 5 wetlands that have been in existence for more than 25 years;~~ impacts resulting from maintenance and repair of existing public drainage systems conducted or authorized by a public drainage authority pursuant to Minnesota Statutes, chapter 103E, when these projects do not drain shallow marsh, deep marsh, or shallow open water communities that have existed for more than 25 years prior to the proposed project.

The edits above accommodate the transition from Circular 39 to the wetland plant community system and rewords existing text to read more clearly without changing administration or intent. BWSR may expand guidance in the administrative manual to include a checklist of actions necessary to comply with MS 103E and therefore qualify for this exemption. BWSR may also develop guidance on what constitutes drainage of marsh and open water wetlands for this part.

F. The public drainage authority may, as part of the repair, install control structures, realign the ditch, construct dikes along the ditch, or make other modifications as necessary to prevent drainage of a wetland.

G. Wetlands and public waters of all types that ~~could~~ may be drained as a part of a public drainage repair project are eligible for the permanent wetlands preserve program established under Minnesota Statutes, section 103F.516. The board shall give priority to acquisition of easements on ~~types 3, 4, and 5 wetlands~~ shallow marsh, deep marsh, and shallow open water wetlands that have been in existence for more than 25 years on public drainage systems and other wetlands that have the greatest risk of drainage from a public drainage repair project.

The sections above are currently in the drainage exemption and are proposed to be relocated to item A because they apply only to public drainage maintenance and are not relevant to other portions of this exemption.

D(2). Private drainage system maintenance. ~~a~~ A replacement plan is not required for draining, excavating, or filling of wetland, ~~except for draining wetlands that have been in existence for more than 25 years;~~ impacts resulting from maintenance and repair of existing private drainage systems ~~other than public drainage systems,~~ when these projects do not drain wetlands that have existed for more than 25 prior to the proposed project.

The edits above reword existing text to read more clearly without changing administration and accommodates the transition from Circular 39 to wetland plant communities.

E.B. Drainage Enhancement. A replacement plan is not required for:

(1) draining wetland on agricultural land ~~that~~ when the wetland was:

(a) ~~was~~ planted with annually seeded crops prior to July 5, except for crops that are normally planted after this date, in eight out of ten most recent years prior to the impact;

(b) ~~was~~ in a crop rotation seeding of pasture grass, cover crop, or legumes, or was fallow for a crop production purpose in eight out of the ten most recent years prior to the impact; or

(c) ~~was~~ enrolled in a state or federal land conservation program and met the requirements of clause (1) or (2) prior to enrollment.

Documentation, such as aerial photographs; ~~and United States Department of Agriculture records, or affidavit of landowner must be required by the local government unit to show and use may be used~~ as evidence for this exemption. A sworn affidavit from current or previous landowners or others with specific knowledge about the project may be provided in the absence of, or as a supplement to, the above evidence.

The edits above are proposed to make the documentation criteria of this drainage exemption read the same as that required for the agricultural exemption in item A of subpart 1, and to clarify that the exemption applies to draining wetlands on ag land, not draining ag land in general. The existing language in subpart 1 has been accepted since the first permanent WCA rule in 1993.

~~F. The public drainage authority may, as part of the repair, install control structures, realign the ditch, construct dikes along the ditch, or make other modifications as necessary to prevent drainage of the wetland.~~

~~G. Wetlands and public waters of all types that could be drained as a part of a public drainage repair project are eligible for the permanent wetlands preserve program established under Minnesota Statutes, section 103F.516. The board shall give priority to acquisition of easements on types 3, 4, and 5 wetlands that have been in existence for more than 25 years on public drainage systems and other wetlands that have the greatest risk of drainage from a public drainage repair project.~~

The deleted text above is proposed to be relocated to item A because it applies only to public drainage maintenance and is not relevant to other portions of this exemption.

~~—B(2). A replacement plan is not required for draining of type 1 wetlands, or up to five acres of type 2 or type 6 wetlands seasonally flooded basins, or up to five acres of sedge meadow, fresh (wet) meadow, wet to wet-mesic prairie, shrub-carr, or alder thicket wetlands, in an unincorporated area on land that has been assessed drainage benefits for a public drainage system, provided that:~~

(a) during the 20-year period that ended January 1, 1992:
i there was an expenditure made from the drainage system account for the public drainage system;

ii the public drainage system was repaired or maintained as approved by the drainage authority; or

iii no repair or maintenance of the public drainage system was required under Minnesota Statutes, section 103E.705, subdivision 1, as determined by the public drainage authority; and

(b) the wetlands are not drained for conversion to:

i platted lots;

ii planned unit, commercial, or industrial developments; or

iii any development with more than one residential unit per 40 acres, except for parcels subject to local zoning standards that allow family members to establish an additional residence on the same 40 acres.

If wetlands drained under this item are converted to uses prohibited under subitem (2b) during the ten-year period following drainage, the wetlands must be replaced under Minnesota Statutes, section 103G.222.

The highlighted subitem above was relocated to the agricultural drainage item of this subpart because it covers new drainage activities on agricultural land. Edits in this section serve to accommodate the transition from Circular 39 to the wetland plant community system.

~~—H. Present and future owners of wetlands drained or filled without replacement under an exemption in part 8420.0122, subpart 2, item, can make no use of the wetland area after it is drained, excavated, or filled, other than as agricultural land, for at least ten years after the draining, excavating, or filling, unless it is first replaced under the requirements of Minnesota Statutes, section 103G.222. Also, for at least ten years the wetland may not be restored for replacement credit. Except for land in public ownership, at the time of draining, excavation, or filling, the local government unit may require the landowner to record a notice of these restrictions in the office of the county recorder for the county in which the project is located. The local government unit may require recording a notice of these restrictions if it determines the wetland area drained is at risk of conversion to a nonagricultural use within ten years based on the zoning classification, proximity to a municipality or full-service road, or other criteria as determined by the local government unit. In making a determination under this subpart, the local government unit must review the applicable comprehensive plan when evaluating the risk of conversion to a non-agricultural use and monitor and enforce the prohibition on using the area drained, filled or excavated for a non-agricultural purpose for at least ten years.~~

~~—At a minimum, the recorded document must contain the name or names of the landowners, a legal description of the property to which the restrictions apply, a statement of the restrictions, the date on which the restriction expires, the name of the local government which certified the exemption, if such occurred, the signatures of all owners, and an acknowledgment.~~

This item is proposed to be relocated to part 8420.0700. See discussion in that section.

Subp. 3. **Federal approvals.** A replacement plan for wetlands is not required for ~~activities~~impacts authorized under section 404 of the federal Clean Water Act, United States Code, title 33, section 1344, or section 10 of the Rivers and Harbors Act of 1899, United States Code, title 33, section 403, and regulations that meet minimum state standards under this chapter and that have been approved by the board ~~of water and soil resources~~, the department of agriculture, the department of natural resources, and the pollution control agency.

Subp. 4. **Restored Wetlands restoration.** A replacement plan for wetlands is not required for:

A. ~~activities~~impacts associated with returning a wetland to pre-project conditions, when the ~~in a~~ wetland was intentionally restored for conservation purposes under a contract or easement providing the landowner with the right to drain the restored wetland. The landowner must provide a contract or easement conveyance or affidavit demonstrating that the landowner or a predecessor restored the wetland for conservation purposes but retained the right to subsequently drain the restored wetland to pre-project conditions. This exemption does not apply to wetlands impacted more than 25 years after expiration of the relevant contract or easement.

B. ~~activities~~impacts associated with returning a wetland to pre-project conditions, when the ~~in a~~ wetland was intentionally restored or created by a landowner ~~without any~~with no assistance or financing from public agencies or private entities other than the landowner ~~and the wetland has not been used for wetland replacement or deposited in the state wetland bank~~. For purposes of this subpart, assistance by public agencies does not include consultation on project design or advice on the project's relationship to state or federal programs.

The landowner must provide a contract, billing statements or affidavit demonstrating that the landowner or a predecessor restored or created the wetland without any assistance or financing from public agencies or private entities other than the landowner. The landowner must also provide sufficient information to determine that the area was not wetland prior to the restoration or creation ~~activity~~project. This exemption does not apply to wetlands impacted more than 25 years after the restoration or creation project.

The two additions above are proposed in order to place a reasonable timetable on the applicability of this exemption. Many contracts relevant to the first part of this exemption are a minimum of 10 years in length and some may be 30 or more, resulting in a minimum 35-year window where a wetland may be impacted using this exemption. A time limit on this exemption is intended to aid LGUs in administering this exemption because it can be difficult or impossible to determine eligibility for this exemption on projects that occurred 35 or more years prior to a proposed impact, particularly when the property has changed hands. BWSR staff also intend to revisit the terminology in the added language above that currently refers to the "project" and may change it for consistency with other parts.

~~— Subp. 5. **Incidental wetlands.** A replacement plan for wetlands is not required for:~~

~~— A. activities in wetland areas created solely as a result of:~~

~~— A. beaver dam construction;~~

~~— B. blockage of culverts through roadways maintained by a public or private entity;~~

~~— C. actions by public or private entities that were taken for a purpose other than creating the wetland; or~~

~~— D. any combination of items A to C.~~

~~—Wetland areas created by beaver activities may be drained by removing those materials placed by beaver. Drainage is permitted by removing or moving materials blocking installed roadway culverts and related drainage structures. Additional excavation or removal of other materials is not permitted unless it can be shown by aerial photographs that the proposed activity will not drain or fill wetland that was there before the beaver dam was built or before the culvert became plugged.~~

~~—Wetland areas may be drained, excavated, or filled if the landowner can show that the wetland was created solely by actions, the purpose of which was not to create the wetland.~~

~~—Impoundments or excavations constructed in nonwetlands solely for the purpose of effluent treatment, storm water retention, soil and water conservation practices, and water quality improvements, and not as part of a wetland replacement process that may, over time, take on wetland characteristics, are also exempt.~~

The incidental exemption is proposed to be relocated to the Scope and No-Loss sections. Rational for this relocation can be found in those sections and in the “Scope, No-Loss, and Exemptions” framework included with the Advisory Committee materials. Edits to the language will be discussed in the new locations.

Subp. ~~65~~. **Utilities; public works.**

A. new placement or maintenance, repair, enhancement, or replacement of existing utility or utility type service, including pipelines, if:

(i) the direct and indirect impacts of the proposed project have been avoided and minimized to the extent possible; and

(ii) the proposed project ~~significantly modifies or alters impacts~~ less than one half acre of wetlands;

B. ~~activities impacts~~ associated with operation, routine maintenance, or emergency repair of existing utilities and public work structures, including pipelines, provided the ~~activities project~~ does not result in additional wetland intrusion or additional ~~draining or filling of a wetland either wholly or partially impacts~~;

C. repair and updating of existing individual sewage treatment systems necessary to comply with local, state, and federal regulations; or

D. for maintenance, repair, and replacement, the local government unit may issue a seasonal or annual exemption certification or the utility may proceed without local government unit certification if the utility is carrying out the work according to approved best management practices. Work of an emergency nature may proceed as necessary and any ~~drain or fill activities impacts~~ shall be addressed with the local government unit after the emergency work has been completed.

Changes to the Utilities; Public Works Exemption are not proposed at this time. However, some issues regarding the exemption language have recently been raised by BWSR staff and the above language may be revisited later in the rule revision process.

Subp. ~~76~~. **Forestry.** A replacement plan for wetlands is not required for:

A. temporarily crossing or entering a wetland to perform silvicultural activities, including timber harvest as part of a forest management ~~activityproject~~, so long as the ~~activityproject~~ limits the impact on the hydrologic and biologic characteristics of the wetland; the ~~activityproject~~ does not result in the construction of dikes, drainage ditches, tile lines, or buildings; and the timber harvesting and other silvicultural practices do not result in ~~the drainage of permanent loss of the~~ wetland or public waters; or

B. permanent access for forest roads across wetlands so long as the ~~activityproject~~ limits the impact on the hydrologic and biologic characteristics of the wetland; the construction activities do not result in the access becoming a dike, drainage ditch, or tile line; ~~fillingimpact~~ is avoided wherever possible; and there is no drainage of ~~the~~ wetland or public waters.

This exemption is for roads constructed for the primary purpose of providing access for the conduct of silvicultural activities.

Subp. ~~97~~. **De minimis.**

A. Except as provided in items B and C, a replacement plan for wetlands is not required for ~~draining, excavating, or fillingimpacting~~ the following amounts of wetlands as part of a project:

(1) in a greater than 80 percent area, ~~including Isanti County~~:

(a) 10,000 square feet of ~~type 1, 2, 6, or 7~~ wetland, except for ~~shallow marsh, deep marsh, shallow open water, open bog, coniferous bog, and coniferous swampwhite cedar and tamarack wetland~~, outside of the shoreland wetland protection zone; ~~or~~

(b) 400 square feet of ~~type 1, 2, 6, or 7~~ wetland, except for ~~shallow marsh, deep marsh, shallow open water, open bog, coniferous bog, and coniferous swampwhite cedar and tamarack wetland~~, outside of the building setback zone, as defined in the local shoreland management ordinance, but within the shoreland wetland protection zone. This amount may be increased to 1,000 square feet by the local government unit if the wetland is isolated and determined to have no direct surficial connection to the public water;

~~(c) 100 square feet of type 3, 4, 5, 8, and white cedar and tamarack wetland shallow marsh, deep marsh, shallow open water, open bog, coniferous bog, and coniferous swamp outside of the building setback zone as defined in the local shoreland management ordinance; or~~

~~(d) 20 square feet of any wetland, regardless of type, inside the building setback zone, as defined in the local shoreland management ordinance.~~

(2) in a 50 to 80 percent area:

(a) 5,000 square feet of ~~type 1, 2, 6, or 7~~ wetland, except for ~~shallow marsh, deep marsh, shallow open water, open bog, coniferous bog, and coniferous swampwhite cedar and tamarack wetland~~, outside of the shoreland wetland protection zone, and outside of the 11 county metropolitan area;

(b) 2,500 square feet of ~~type 1, 2, 6, or 7~~ wetland, except for ~~shallow marsh, deep marsh, shallow open water, open bog, coniferous bog, and coniferous swampwhite cedar and tamarack~~

~~wetland~~, outside of the shoreland wetland protection zone, and inside the 11 county metropolitan area;

(c) 400 square feet of ~~type 1, 2, 6, or 7~~ wetland, except for shallow marsh, deep marsh, shallow open water, open bog, coniferous bog, and coniferous swamp~~white cedar and tamarack wetland~~, outside of the building setback zone, as defined in the local shoreland management ordinance, but within the shoreland wetland protection zone;

(d) 100 square feet of type 3, 4, 5, 8, and white cedar and tamarack wetland shallow marsh, deep marsh, shallow open water, open bog, coniferous bog, and coniferous swamp outside of the building setback zone as defined in the local shoreland management ordinance; or

(e) 20 square feet of any wetland, regardless of type, inside the building setback zone, as defined in the local shoreland management ordinance.

(3) in a less than 50 percent area:

(a) 2,000 square feet of ~~type 1, 2 or 6~~ seasonally flooded basin, sedge meadow, fresh wet meadow, wet to wet-mesic prairie, shrub carr, or alder thicket wetland outside of the shoreland wetland protection zone, and outside the 11 county metropolitan area;

(b) 1,000 square feet of ~~type 1, 2 or 6~~ seasonally flooded basin, sedge meadow, fresh wet meadow, wet to wet-mesic prairie, shrub carr, or alder thicket wetland outside of the shoreland wetland protection zone, and inside the 11 county metropolitan area;

(c) 400 square feet of ~~type 1, 2, or 6~~ seasonally flooded basin, sedge meadow, fresh wet meadow, wet to wet-mesic prairie, shrub carr, or alder thicket wetland outside of the building setback zone, as defined in the local shoreland management ordinance, but within the shoreland wetland protection zone; ~~or~~

(d) 100 square feet of shallow marsh, deep marsh, shallow open water, open bog, coniferous bog, hardwood swamp, and coniferous swamp type 7 wetland outside of the building setback zone, as defined in the local shoreland management ordinance; or

(e) 20 square feet of any wetland, regardless of type, inside the building setback zone, as defined in the local shoreland management ordinance.

~~(4) statewide:~~

~~(a) 100 square feet of type 3, 4, 5, 8, and white cedar and tamarack wetland outside of the building setback zone, as defined in the local shoreland management ordinance;~~

~~(b) 20 square feet of wetland, regardless of type, inside the building setback zone, as defined in the local shoreland management ordinance.~~

In addition to accommodating the transition to the wetland plant community typing system, the changes above are intended to simplify the de minimis exemption to the extent possible without a change in statute. The section has been organized as >80, 50–80, and <50 percent areas, and all potential de minimis amounts are included for each area. The edits are simply a reorganization of existing rule language and should at least make it easier to determine the applicable de minimis for each area of the state.

B. The amounts listed in item A may not be combined on a project.

C. This exemption no longer applies to a landowner's portion of a wetland when the proposed project impact area and the cumulative area of the landowner's portion ~~drained, excavated, or filled~~impacted since January 1, 1992, is the greater of:

- (1) the applicable area listed in item A, if the landowner owns the entire wetland;
- (2) five percent of the landowner's portion of the wetland; or
- (3) 400 square feet.

No changes are currently proposed to item C above. However, BWSR staff are currently discussing possible language to clarify the implementation of the 5% component and making it relative to any wetland regardless of single or multiple ownerships. Another option would be to eliminate the 5% issue from consideration. This change would simplify the interpretation and implementation of the de minimis exemption, however, deletion of the 5% rule may require a statute change. Item C may be revisited.

D. ~~This exemption may not be combined with another exemption on a project.~~

This is stated in the Scope of Exemption Standards and is applicable to all exemptions, therefore it does not need to be stated here specifically for de minimis.

~~—E. Property may not be subdivided solely to increase the amounts listed in Again exemptions under this part.~~

~~F. For purposes of this subpart, for wetlands greater than 40 acres, the wetland type may be determined to be the wetland type with the deepest water regime within the wetland and within 300 feet of the impact.~~

~~GE.~~ For purposes of this subpart, the 11 county metropolitan area consists of the counties of Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, and Wright.

Change to item E is for clarification of intent and deleting item F is possible due to the switching of wetland typing methodologies from Circular 39 to wetland plant communities.

Subp. 10. **Wildlife habitat.** A replacement plan for wetlands is not required for:

~~A. excavation or the associated deposition of spoil~~impacts within a wetland for the primary purpose of a wildlife habitat improvement project, if:

- (1) the total area of ~~deposition, and excavation if within the permanently and semipermanently flooded areas of type 3, 4, or 5 wetlands,~~impact does not exceed five percent of the wetland area or one-half acre, whichever is less, and ~~the any~~ spoil is stabilized and permanently seeded with native, noninvasive species to prevent erosion;

(2) the project does not have an adverse ~~impac~~~~effect~~ on any ~~species designated as endangered or threatened under state or federal laws~~special considerations and restrictions as identified in part 8420.0400, subpart 2; and

(3) the project will provide wildlife habitat improvement as certified by the soil and water conservation district or technical evaluation panel using the "Wildlife Habitat Improvements in Wetlands: Guidance for Soil and Water Conservation Districts and Local Government Units in Certifying and Approving Wetland Conservation Act Exemption Proposals, Minnesota Interagency Wetlands Group, December 2000" or similar criteria approved by the board; or

The changes above are proposed for clarification purposes and to make the exemption more understandable.

B. duck blinds.

8420.0210 EXEMPTION DETERMINATIONS.

A landowner intending to ~~drain or fill~~ **impact** a wetland without replacement, claiming exemption under part [8420.0122](#), may contact the local government unit before beginning ~~draining or filling~~**impact** activities for determination whether or not the ~~activity~~**impact** is exempt. A landowner who does not request a determination may be subject to the enforcement provisions in part [8420.0290](#) and Minnesota Statutes, section [103G.2372](#). ~~The local government unit must keep on file all documentation and findings of fact concerning exemption determinations for a period of ten years.~~

An exemption may apply whether or not the local government unit has made an exemption determination. If the landowner requests an exemption determination, then the local government unit must make one.

The landowner applying for exemption is responsible for submitting the proof necessary to show qualification for the particular exemption claimed, including proof of the requisite property rights to do the activity. The local government unit may evaluate evidence for an exemption without making a determination.

The local government unit decision shall be based on the exemptions standards in part [8420.0122](#). If the decision requires a finding of wetland size or type, the local government unit should seek the advice of the technical panel as described in part [8420.0240](#). ~~The local government unit decision must be made in compliance with Minnesota Statutes, section 15.99. The local government unit decision must be sent to the landowner, members of the technical evaluation panel, the watershed district or water management organization if there is one, the commissioner of natural resources, and individual members of the public who request a copy within ten working days of the decision.~~

The grey strikeout language has been moved to the LGU duties and application sections. BWSR staff may consider reorganizing other language in this section later in the rule revision process as well.